amount to having no evidence that the suspected substances and the traces of some substance found on the container or case for the weighing scale were in fact heroin. There was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in were in fact heroin.

The next question that arose was whether I should exercise my discretion in invoking section 425. The cardinal rule about the prosecution having had to have sufficient evidence to prove every ingredient of the offence by the close of the prosecution case was clearly broken in this case by a most unfortunate oversight. Viscount Sankey L.C., *Maxwell* v. *The Director of Public Prosecutions,*[3] had this to say:

"It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited."

The spirit of the criminal law was thus highlighted, and the quoted passage should, in my view, prevail over the oft-quoted *dictum* that there is justice also for the victim of the crime, apart from justice for the accused. The statement of Viscount Sankey would be particularly trenchant when a case of capital offence is involved, so that if a mistake is made, and a warrant of execution is carried out, it is absolutely irreversible.

Having regard to all the circumstances, including my view on the effect of our system of trial being adversarial, I did not think I should exercise my discretion by invoking section 425 of the Criminal Procedure Code, I therefore declined to exercise it.

Having said this, though not strictly necessary, but out of deference to the learned Deputy, I think I ought to comment on the two cases cited by him. The first case of *Ramli bin Kechik* is distinguishable, because section 425 was invoked during the course of prosecution case and not after its close. To invoke the section 425 after the close of prosecution case would, in my view, amount to the Court descending to the arena. The second unreported case is also distinguishable because it was concerned with recall of witnesses.

In the circumstances, I acquitted and discharged the accused without calling for his defence.

Accused acquitted and discharged.

Solicitors: *Karpal Singh & Co.*

UNITED ORIENTAL ASSURANCE SDN. BHD. v. NG KING SEE

[A.C.J. (Yusoff Mohamed J.) December 28, 1986]
[Johore Bahru – Civil Suit No. 273 of 1980]

Insurance – Motor vehicle – Insurance policy containing condition that insurers not liable if vehicle driven by person below 21 years old – Fatal accident – Vehicle of insured driven by person aged 20 – Estate commenced action against insurers – Insurers' counsel consenting to judgment against insured without latter's retainer – Whether counsel's conduct wrongful – Setting aside judgment in default of appearance – Whether delay of 3 years reasonable.

The defendant obtained an insurance policy from the plaintiffs against third party risks in respect of his motorcar, JK9189. The vehicle was involved in an accident and the driver was one Tan, aged 20, authorized by the defendant. The plaintiffs contended that it was a condition of the insurance policy that they would not be liable *inter alia* if the insured vehicle was at the time of the accident driven by a person below the age of 21 years. The victim of the accident died and his estate commenced proceedings against the insurers in Johore Bahru High Court where settlement was reached at $29,000 and consented to on September 23, 1979, by the plaintiffs' counsel, who was not retained by the defendant. Judgment was entered against the defendant for $29,000. The plaintiffs paid this sum to the estate and now seek to recover it as reimbursement from the defendant for money paid on his behalf. The Senior Assistant Registrar found in favour of the plaintiffs in the suit and dismissed the defendant's application filed on June 10, 1985, to set aside the judgment in default of appearance entered on August 24, 1982. The defendant appealed to the Judge against the decision of the Senior Assistant Registrar.

Held, allowing the appeal: (1) by repudiating the policy, the plaintiffs ceased to be bound by the contract. In the absence of proper retainer by the defendant, it was wrongful for the plaintiff's counsel to consent to the settlement on behalf of the defendant on the claim against his interest. The fact that the defendant had earlier knowledge of the claim against him is irrelevant. Clearly there is some evidence of abusing the process of the court;

(2) although the delay of nearly 3 years in making the application to set aside the judgment was necessarily long, the defendant has given reasonable grounds challenging the substituted service of the writ. There are also points of law raised which are of public interest whether such manipulation by the insurers would bind the defendant. The plaintiffs are not in any way prejudiced by the delay. This is therefore a fit case to disregard the lapse of time;

(3) defendant is given two weeks to file his statement of defence.

APPEAL FROM REGISTRAR.

Anantha Kumar for the appellants/plaintiffs.
R.K. Menon for the respondent/defendant.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an appeal from the Senior Assistant Registrar's decision on an application by the defendant for setting aside a judgment in default of appearance entered against him by the plaintiffs on August 24, 1982.

The Senior Assistant Registrar had dismissed the application. On this appeal I reversed the S.A.R.'s decision and conversely the plaintiffs now appeal.

The claim by the plaintiffs against the defendant is for indemnity amounting to $29,000/–. The defendant obtained an insurance policy from the plaintiffs against third party risks in respect of his motorcar JK 9189. The plaintiffs contended that it was a condition of the insurance policy that the insurers will not be liable *inter alia* if the insured vehicle is at the time of the accident driven by a person who is below the age of 21 years – see Exhibit N2: under Alcohol/or Drug clause.

The insured vehicle was involved in an accident and the driver was one Tan Swee Huat who was authorised by the defendant. He was 20 years of age then. The victim of the accident died and his estate commenced proceedings against the insurers in Johor Bahru High Court Civil Suit No. 276 of 1978 where settlement was reached and consented to by the plaintiffs' counsel. The judgment entered against the defendant was for a sum of $29,000/– to be paid to the victim's estate by the plaintiffs as insurers and upon payment both the plaintiffs and the defendant were discharged from further liability (para. 7 of Exhibit N.8 Enclosure (25)). The present suit is by the plaintiffs to recover this sum of $29,000/– as reimbursement from the defendant for money paid on his behalf.

The Senior Assistant Registrar found that the order for substituted service dated September 8, 1981 having been complied with, the judgment in default of appearance was validly obtained. She was also of the opinion that the defendant had not proved to the satisfaction of the court that he had completely no knowledge of the legal proceedings against him as he offered no explanation as to why a solicitor was instructed to act for him, as evidenced by the letter exhibited in Enclosure 25 Exhibit N-11 (dated 12.4.1980). This letter was in respect of the claim in Civil Suit 276/78.

On the Statement of Defence, the Senior Assistant Registrar found that the proposed defence main contention in that the plaintiffs had not been consulted nor obtained authorisation and consent from the defendant before coming to a settlement in Civil Suit No. 276/78 was superfluous by reason that the settlement between the parties there in Civil Suit No. 276/78 had been approved by the learned Judge.

It was finally held by the Senior Assistant Registrar that the defendant had not raised any merits to his defence, the application was therefore dismissed with costs.

I will deal first with the merit of the defendant's Statement of Defence.

In paragraphs 7 and 8 of the proposed Statement of Defence in Exhibit 9 to enclosure (22), the defendant states that the plaintiffs had entered into settlement of the claim by the victim's estate in Civil Suit No. 276/78 to his detriment and without his authority and that he had no knowledge that the consent judgment was given against him.

The plaintiffs' affidavit in reply at enclosure (25) Exhibit N-8 shows that in Civil Suit No. 276/78, the judgment in terms of settlement against the defendant for a sum of $29,000/– was granted by the court on September 23, 1979. On record it appeared that Mr. Varughese acted as counsel for the defendant and he consented to the judgment.

From paragraphs 8, 9 and 25 of the plaintiffs' affidavit, it would appear that Mr. Varughese was in fact the plaintiffs' counsel when the consent judgment was taken against the defendant. He was not retained by the defendant. Upon this ground alone there is substance in the defendant's contention that the settlement was obtained without his knowledge.

The plaintiffs' affidavit also states that earlier on August 20, 1977, the plaintiffs had informed the defendant by letter to the effect that by reason of breach of the policy of insurance as above stated, the plaintiffs had repudiated all liabilities

under the policy issued to the defendant – Exhibit N-7 enclosure (25).

It may be construed that the plaintiffs by this letter intended to repudiate the whole policy and not just the victim's claim under the said policy.

On the effect of such repudiation, *Halsbury's* Laws of England 4th Edition on Insurance Vol. 25 at paragraph 377 states:–

"The common law right is one which can only be exercised in relation to the whole contract. The insurers are not entitled to treat the contract as subsisting for some purposes, but not for others; *if they elect to repudiate the policy, there ceases for any purpose to be a contract between the parties.* It is an entirely different situation, governed by different principles, where insurers seek to repudiate, not the policy, but a claim under it." (emphasis supplied).

In this view, by its repudiation of the policy, the plaintiffs ceased to be bound by the contract. It follows that the plaintiffs had no duty or obligation to represent the defendant in effecting settlement of the claim by the victim of the accident against the defendant in Civil Suit 276/78 and more so to bind the defendant by such settlement. In my view in the absence of proper retainer by the defendant, it was wrongful for Mr. Varughese to consent to the settlement on behalf of the defendant on the claim against his interest. The fact that the defendant had earlier knowledge of the claim against him is irrelevant. Clearly there is some evidence of abusing the process of the court.

Next, the delay in making the application to set aside this judgment.

The Writ in this action for indemnity was issued on September 15, 1980. Substituted service was effected on September 12, 1981, and the judgment in default of appearance was entered on August 24, 1982. The application to set aside the judgment was filed on June 10, 1985. The delay in making this application was nearly 3 years.

The rule is that such application must be made promptly and within a reasonable time. But the rule also allows the Court in a proper case to disregard the lapse of time.

In the present case, the claim is for reimbursement of money already paid. Although the delay was necessarily long, the defendant was given reasonable grounds challenging the substituted service of the Writ. There are also points of law raised which are of public interest whether such manipulation by the insurers would bind the defendant. The plaintiffs are not in any way prejudiced by the delay.

In these circumstances I find that this is a fit case to disregard the lapse of time.

The appeal from the Senior Assistant Registrar's decision for these reasons is allowed. The defendant is given two weeks to file his Statement of Defence.

Order accordingly.

Solicitors: *Varughese & Co.; R.K. Menon & Co.*

HONG LEONG FINANCE BERHAD v. LEE CHENG HENG t/a LEE CHENG HENG EARTHWORKS & ANOR.

[A.C.J. (Yusoff Mohamed J.) December 28, 1986]
[Johore Bahru – Civil Suit No. 24-1037-1985]

Hire-purchase – Default in instalments – Repossession of vehicle – Sale of vehicle by owner – Claim for loss by owner against hirer – Allegation of sale below market price – Mitigation of damages – Owner's duty to act reasonably and responsibly – Hire-Purchase Act 1967, ss. 16(3) & 18(2).

This appeal against the decision of the Senior Assistant Registrar concerned a road grader under a hire purchase agreement dated May 26, 1983, executed between the plaintiffs as owners and the first defendant as hirer and the second defendant as guarantor. The total hire purchase price was $71,584.50 payable by initial deposit of $18,664.50 and 24 monthly instalments of $2,205.00 each. The first defendant defaulted payment from September 3, 1984. The plaintiffs determined the agreement and repossessed the vehicle on November 17, 1984. They sold it on September 11, 1985, and now claim the loss of $32,284.16. The Senior Assistant Registrar found as a fact the agreement to be a hire purchase agreement where the subject was a vehicle, and it thus raised an issue as to whether the Act applies to the present transaction. If it does, then all the ensuing remedies for breach of the Act would follow. The plaintiffs appealed.

Held, dismissing the appeal: (1) the decision of the Senior Assistant Registrar was right. Further paragraphs 9 and 10 of the Statement of Defence also raised the issue that the vehicle was sold by the plaintiffs at below the market price and that it was unfair to the defendants;

(2) the defendants were entitled to mitigate damages allegedly due from them. Having done this on behalf of the defendants, the plaintiffs were duty bound to act reasonably and responsibly and were actionable at the instance of the defendants;